STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2003
v	No. 230717 Wayne Circuit Court
DALE D. HARPER, Defendant-Appellant.	LC No. 99-012336

Before: White, P.J., and Kelly and R. S. Gribbs*, JJ

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and assault with intent to commit great bodily harm, MCL 750.84. He was sentenced to concurrent prison terms of thirty to sixty years for the murder conviction and five to ten years for the assault conviction. He appeals as of right. We conclude that defendant's trial counsel was ineffective for not filing a proper notice of alibi defense, and that there is a reasonable probability that the result of the proceeding would have been different but for this error. We reverse, and remand for a new trial.

This case is being submitted with that of codefendant Keith Tate, *People v Tate* (Docket No. 231230). Defendant's convictions arise from his alleged involvement in a drive-by shooting in which Toriano Collins was killed, in front of a then-vacant but former drug house at 232 South Military Street in southwest Detroit. A second person, Robert Madden, was present with Collins; a bullet struck his coat zipper and he avoided injury. There was no physical evidence linking Harper or codefendant Tate to the incident. The weapon that killed Collins was never found. Madden was the sole eyewitness to testify at trial. At trial, he identified codefendant Tate as having been the drive-by shooter and seated in the front passenger seat of the vehicle involved. Madden testified at the preliminary examination and at trial that he did not see the *driver* of the car at all.

On the evening of the shooting, Madden told police that Collins sold drugs, that a drug deal had just gone down when the shooting occurred, that there were a lot of people around when the shooting occurred, and that the green Ford Tempo from which the shots were fired was the same green Ford Tempo he had seen at a drug house on South Dragoon Street. At trial, Madden, who testified he had been an auto mechanic for over twenty-five years, testified for the first time

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

that the vehicle involved in the drive-by shooting was a Geo Metro (a Chevrolet), and not a Ford Tempo. Madden also testified at trial that there were no other persons around when the shooting occurred. Further, during a taped interview, which was admitted and excerpts of which were played at trial, Madden repeatedly stated to defense counsel that Tate was not the shooter and that he, Madden, was put up to stating that he was by the police and police harassment.

Defendant Harper was held by the police for several days before he made a statement incriminating himself.[1] Defendant's initial statements to the police, on the evening of November 22, 1999 and the following day, denied involvement in the drive-by shooting and explained that he was with friends at a house at 1211 Lewerenz Street on the day and evening of the shooting, November 21, 1999. Harper gave the police the names of the friends he was with on Lewerenz Street. The following day, November 23, 1999, Sgt. Lovier, the officer in charge of the case, questioned Harper and he again denied involvement in the incident. Sgt. Lovier testified that he then questioned defendant again because he had "received information," in the interim.[2] On

[1] The trial court denied defendant's motion to suppress the statement as involuntary, and that issue is not raised on appeal.

[2] At the *Walker* [*People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965),] hearing, see n 1, *supra*, Sgt. Lovier testified regarding the "information" he received that led him to question defendant again:

> MR. O'NEILL [*defendant's trial counsel*]: Your Honor, the last motion is my motion to suppress that statement so we won't need two juries. [Co-defendant's counsel had just requested separate juries because of Harper's statement to the police.] . . . . Basically, the elements of this case that makes this an involuntary admission or statement which, in essence, is an admission of involvement in this offense, are very simple. He was questioned three times by the officer that is going to be called as a witness by the People, and between, we think, four to six times, by other officers. He asked for an attorney every time that he had a cop come up to him. Every single time he was denied. He made a statement that did not implicate him. But they didn't let him go, they kept him. He said, "I have people I was with." The police said, "We talked to those people, those people said you're lying; your friends are turning on you; don't worry about it, just make a statement." By the way, my motion has a mistake, it would be 72 hours, not the 48. He said –
>
> MR. SCAVONE: (Interposing) Well, Judge, I'd like to object for a second. I mean I don't want to be rude about this, but if – this sounds like argument after the motion is done.
>
> MR. O'NEILL: No.
>
> MR. SCAVONE: And unless the defendant testifies to all these things, this is really not going to be part of the record. So, I think we should do the hearing, first, and the we can argue it later.
>
> THE COURT: All right.

(continued…)

(…continued)

* * *

So, do you want to call your witness?

MR. SCAVONE: Sure.

* * *

BY MR. SCAVONE:

Q. Sergeant Lovier, as officer in charge of this case . . . .

* * *

Do you remember when it was when you first talked to Mr. Harper?

A. It would have been November 23rd.

Q. About what time?

A. I'd have to refer to the file.

Q. Okay.

A. About 1:35 p.m.

Q. Okay. That was the first time you came into contact with Mr. Harper?

A. Yes, sir.

Q. And at that time, did you know on what date and time that Mr. Harper had been arrested?

A. Yes, sir.

Q. When was that?

A. November 22nd. It was in the evening hours.

Q. Okay. So, he'd been in custody probably sixteen hours, or so.

A. Yes, sir.

* * *

(continued…)

(…continued)

Q. And the statement that was taken by you, on the 23rd, from Mr. Harper, basically that was not—wasn't that a statement that Mr. Harper wasn't even there?

A. He wasn't there and didn't know what I was talking about.

Q. Okay. And as a result of that—I'm sorry. Prior to your taking the statement, the first statementon the 23rd, you had information that Mr. Harper was involved in this?

A. Yes, I did.

Q. Okay. And who was that from?

A. That was the owner of the car; that she knew who she gave the car to.

Q. Okay. And after Mr. Harper made his statement that basically was a denial of being in the vicinity, you didn't let him go, is that right?

A. That's correct.

Q. Okay. And why is that?

A. Because I believed that he did.

* * *

CROSS-EXAMINATION

BY MR. O'NEILL:

* * *

Q. Do you remember that you indicated that there was evidence that Mr. Harper was involved in the incident, right?

A. (No response)

Q. What was that?

A. What evidence?

Q. What directed you to Mr. Harper?

A. The young lady whose car it was --

Q. (Interposing) Was that Wanda Carroll?

(continued…)

(…continued)

A. Yes, sir.

Q. What kind of a car did she drive?

A. It was a small aqua color. I forget what type it was. It was a small, like a --

Q. (Interposing) Was it a '91 Geo Metro?

A. It could be.

Q. And do you know what type of vehicle – *who identified a vehicle at the scene?*

A. Who identified the vehicle at the scene?

Q. Yeah, yeah. Where did you decide that there was a '91 Geo Metro involved.

A. That was just the kind of car that Ms. Carroll had.

Q. So, you just --

A. (Interposing) She was stopped by some officers from the Fourth Precinct.

Q. Okay. Why?

A. Why was she stopped? I have no idea.

Q. Okay. Why did you think her car was involved in this crime?

A. Because she knew Mr. Harper.

Q. Wait a minute. Now, you cant go in that circle [sic]. Why do you think her car was involved in the crime?

A. Because it fit the basic description, plus the fact that she knew some of the people involved.

Q. Wait. Where did you get that car as being the car involved in the crime?

A. I didn't.

Q. How did you know – you said that you picked on Mr. Harper because of the car.

A. That is correct.

Q. Okay. Well, how did you know that was the car?

(continued…)

(…continued)

A. I didn't.

Q. Okay. So, you had no evidence to choose Mr. Harper?

A. She'd – you're losin' me with your question.

* * *

Q. Let's start over. You said that Mr. Harper was identified because Wanda Carroll said that she loaned the car, her car, her '91 Geo Metro, to Mr. Harper.

A. That's correct.

Q. How did you iden—pick that vehicle as being involved in the offense?

A. I didn't. It was a similar color and type.

Q. Who gave you the color and type? Was it --

A. (Interposing) Mr. Madden.

Q. Thank you. Mr. Madden identified what kind of car?

A. I don't recall, off-hand.

Q. Yeah? Was it a Ford Tempo?

A. It could have been.

Q. Do you know whether a Ford Tempo has a hatch-back?

A. Do they?

Q. Yes.

A. I have no idea, sir, at this point. I have no --

Q. (Interposing) If I—okay. Does a—all right. So we're looking for a Geo Metro, but identified as a Ford Tempo.

A. (No response)

Q. My esteemed co-counsel is going to hand you two photographs of two kinds of cars. Now, you're a police officer, so you're – you identify cars a lot, don't you?

(continued…)

(…continued)

A. Yes, sir.

Q. I mean in your career you've been able to say, "That was a Chevy," a thousand times, probably.

A. Probably an older one, yeah.

Q. Yeah. Okay. No, and you've looked at the Geo Metro in that picture?

A. Okay.

Q. Does that have a hatch-back?

A. If you want to call it one, yeah, it could have.

THE COURT: How is all this relevant?

MR. O'NEILL: Because this is what they used to identify Mr. Harper.

THE COURT: But isn't this – this is for voluntariness of the statement, right?

MR. O'NEILL: Yes.

THE COURT: So, what does that have to do with what kind of car and all that kind of stuff?

MR. O'NEILL: Becase what the officers did was convince Mr. Harper that he must have been involved, and that he didn't get to leave until he said something that made him involved. And they convinced him he was driving a car that was involved in a crime when the people that said what the car was wasn't even close to the car.

THE COURT: All right. Proceed?

* * *

Q. . . . . Did you ever question Mr. Harper, ever, about where he was at the time of the offense?

A. Yes, sir.

Q. And what did he tell you?

A. I believe he told me he was home the last – the two prior days, playing Nintendo or some game on television; he hadn't left the house in two days.

Q. Did he tell you who he was with?

(continued…)

November 24, 1999, beginning at around 11:45 p.m., Sgt. Lovier took a statement from defendant, a process which Lovier testified lasted until 1:30 a.m., after reading him his rights and getting his initials on the waiver form.

Sgt. Lovier testified at trial that defendant had given him the names of the persons he was with on the evening in question at the Lewerenz house, but that he (Lovier) did not contact any of them. Lovier admitted that defendant was not permitted to make any phone calls, and testified that defendant at no time requested counsel.

Defendant testified at trial that he was with friends at the 1211 Lewerenz Street address watching football and playing video games on the day and evening of the shooting, and that he was threatened, lied to, and coerced by the police into making the statement he made to Sgt. Lovier. Defendant testified that the police told him that they had spoken to his alibi witnesses and that they were not backing him up, that "Lucky" had told them he was involved in the shooting, and that Wanda Carroll had told the police that he (Harper) borrowed her car the day of the drive-by and did not return it until the next day, and that he (Harper) was going down for murder. Defendant testified that he told the first two sets of officers that interviewed him the truth, that he was not involved in the shooting at 232 South Military, that he was not permitted to make any phone calls and was taken to a cell until the next day, and that the next day the police told him they found his fingerprints in Wanda's car, told him that everyone was pointing the finger at him (Harper), including Lucky and Wanda, and that he was going to get the death penalty. Defendant testified that the officers told him that he could save himself a lot of trouble if he would just say that Lucky did it. Defendant testified that he gave the statement implicating himself and Lucky for those reasons and because he was scared, because Lovier told him he was going to be somebody's boyfriend in prison, and because they told him that his alibi witnesses were all "downstairs" and their statements were not consistent with his.

Defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to file a proper alibi notice, and his subsequent failure to move for a continuance at trial. Under the circumstances presented here, we agree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

(…continued)

A. Yes, sir?

Q. Did you check it out?

A. No, sir.

* * *

[Emphasis added.]

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996), see also *People v Johnson*, 451 Mich 115, 122-125; 545 NW2d 637 (1996). A substantial defense is one that might have made a difference in the trial's outcome. *Hyland, supra* at 710-711.

MCL 768.20 provides in pertinent part:

> (1) If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

The trial court precluded defendant from presenting an alibi defense under MCL 768.21, which provides in pertinent part:

> (1) If the defendant fails to file and serve the written notice prescribed in section 20 [MCL 768.20] . . . , the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi. . . If the notice given by the defendant does not state, as particularly as is known to the defendant or the defendant's attorney, the name of a witness to be called in behalf of the defendant to establish a defense specified in section 20 . . . the court shall exclude the testimony of a witness which is offered by the defendant for the purpose of establishing that defense.

The trial court's opinion denying defendant's motion for new trial states in pertinent part:

> This Court considers defendant's failure to timely file an alibi notice to be a strategic maneuver. Even if defense counsel's performance regarding the alibi witness was objectively unreasonable, defendant was not prejudiced by counsel's conduct. As the trier of fact, this Court finds no basis to conclude that if defendant's alibi had been presented, defendant would not have been found guilty.
>
> As a result of conducting a Ginther hearing, this Court does not believe that defendant's alibi witnesses corroborated defendant's defense and/or offered potentially exculpatory evidence. Their testimony was inconsistent and contradictory to one another and to defendant's testimony at trial.

We conclude that there is no support in the record for the trial court's determination that trial counsel's failure to file a proper alibi notice was a strategic maneuver. Defendant's trial

counsel testified at the *Ginther*[3] hearing that he contacted only one or two of the alibi witnesses defendant had given him, and that one of them appeared at trial. Trial counsel testified that the body of his case was alibi and he was not allowed to present it because of the court's ruling that he did not file a proper notice of alibi defense. Three of the four witnesses that testified at the *Ginther* hearing on defendant's behalf testified that they appeared at trial, but that they had been contacted by defendant's mother, not trial counsel. They testified that they were prepared to testify at trial that defendant was at the house at 1211 Lewerenz on the day and evening of November 21, 1999. Two of the male witnesses testified they were playing video games with defendant, and the testimony indicated that a number of other people stopped by at the Lewerenz house all afternoon and evening. We disagree with the trial court's conclusion that the alibi witnesses did not support defendant's version. They testified at the *Ginther* hearing that they did not notice defendant go out at any time. Defendant testified that he *may* have left the house once, to walk to the store at the end of the block to get a cigar, that it would have been in the evening, after the football game was over, and that he was gone about 10 minutes. There was testimony that the game was over around 4 p.m. The drive-by shooting on South Military Street occurred around 7:30 p.m.

The alibi witnesses' testimony placed defendant at 1211 Lewerenz during the time the drive-by shooting occurred. The identification of the car as being involved was contradictory, given Madden's prior insistence that the car was a Ford Tempo, and there was no other evidence, except defendant's statement, linking him to the offense. Under the circumstances of the defendant's initial denials and his having given the statement after a considerable confinement, a trier of fact would likely have weighed his statement against the strength of his alibi defense. Counsel's ineffectiveness denied defendant the opportunity to present witnesses to support that defense. Defendant has shown that his trial counsel's performance was so deficient that it denied him the effective assistance of counsel and that there was a reasonable probability that the result of the proceedings would have been different but for the error. *Strickland, supra*; *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

We recognize that this was a bench trial, that we have the benefit of the assessment of the trial court, which sat as factfinder, and that that assessment should be accorded great deference. However, the trial court's determination that if defendant's alibi had been presented, defendant would not have been found guilty, is not conclusive. *People v Shepard*, 465 Mich 921; 636 NW2d 514 (2001) (reversing the judgments of this Court and the trial court, following a bench trial, that the defendant was not denied effective assistance of counsel, notwithstanding that the trial court and this Court concluded that the outcome of the trial was not affected). See *People v Shepard*, unpublished opinion per curiam of the Court of Appeals (Docket No. 185242, issued 9/7/99).

Given our disposition, we do not address defendant's remaining arguments.

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[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

We reverse and remand for a new trial.[4] We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs

[4] Because defendant was acquitted of the original charge of first-degree murder, double jeopardy precludes his retrial on that charge. *In re Wayne County Prosecutor*, 192 Mich App 658, 680-681; 482 NW2d 176 (1992).